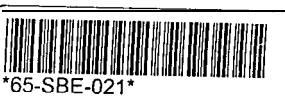
1. RESIDENCE
2. [illegible]
3. [illegible]
4. LOSS ON STOCK UPON LIQUIDATION



BEFORE THE STATE BOARD OF EQUALIZATION'

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MATTHEW BERMAN AND THE ESTATE)
OF SONIA BERMAN)

Appearances:

For Appellants: Albert J. Fink
Attorney at Law

For Respondent: Israel Rogers
Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Matthew Berman and the; Estate of Sonia Berman against proposed'assessments of additional personal income tax against Matthew Berman, individually, in' the amount of $2,601.38 for the year 1951, against the Estate of Sonia Berman, individually, in the amount of $2,601.38 for 'the year 1951, and against Matthew Berman and the Estate of Sonia Berman, jointly, in the amounts of $316.49, $774.57, $225.75, $15.38 and $131.43 for the *years* 1949,1950,1954, 1956 and 1957, respectively. Though Mrs. Berman is. now deceased she and her husband, appellant Matthew Berman, will be referred to hereafter jointly as "appellants."

After this appeal was filed respondent reconsidered its prior disallowance of appellants' use of the installment method of reporting gain realized on their sale in 1951 of certain real property owned by a partnership in which Mr. Berman was a partner. Upon reconsideration respondent determined that appellants' use of the installment method was proper. In addition, since they filed this appeal appellants have'conceded their tax liability, as assessed, for the years 1954, 1956 and 1957. As a result of these adjustments, only' the proposed additional assessments for 1949 and 1950, and a portion of the assessments for 1951 remain *in* issue.

Appeal of Matthew Berman and the Estate of Sonia Berman

This appeal raises four questions: (1) Whether appellants were residents of California during the years 1949, 1950 and 1951; (2) whether appellants were entitled to file amended separate 'resident returns for the years 1949 and 1950 after filing joint nonresident returns for those years; (3). whether appellants were entitled to a loss deduction on the sale in 1951 of their former 'home; and (4) whether appellant's were entitled to defer the gain which they realized on the liquidation in 1951 of a corporation in which they held stock.

RESIDENCE

Prior to 1948, appellants lived in Chicago, Illinois, where Mr. Berman practiced law. In 1948 they came to California and purchased a house in Beverly Hills at a cost of $43,540. At that time their son was attending medical school in this state. Appellants opened accounts in two California banks in 'November of 1949.

During the years 1949 through 1952 appellants divided their time between Chicago, Illinois, Beverly Hills, California, and trips elsewhere. When they were in California they occupied their Beverly Hills home, and when in Chicago they had apartment or hotel accommodations, Throughout that period Mr. Berman maintained his law office in Chicago. He remained a registered voter of Illinois, maintained an account at a Chicago bank, and retained his membership in several clubs in Chicago. In January 1951, appellants ceased occupying their home in Beverly Hills, and it was sold in November of that year. The record does not show where they stayed when in California after January 1951. They concededly became residents of California in 1953, though Mr. Berman continued to maintain his law office in Chicago.

Section 17013 (now section 17014) of the Revenue and Taxation Code defines "resident" to include "Every individual who is in the State for other than a temporary or transitory purpose.' Respondent's regulations explain that a person will be considered a resident of that state with which he has the "closest connection" during the taxable year. (Cal. Admin. Code, tit. ***18, reg.*** 17013-17015(b), now reg. 17014-17016(b).)

One of the primary factors to be examined in determining whether or not a person was in California for other than a temporary or transitory purpose is the amount of time 'spent in this state in each taxable year. The record before us contains several different estimates made by appellants of the time which they spent in California during the years 1949 through 1952. The only detailed estimate that has been presented indicates a division of time approximately as follows:

	California	Illinois	Elsewhere
1949	6-1/2 mos,	4-1/2 mos.	1 mo.
1950	7-1/2 mos.	3-1/2 mos.	1 mo.
1951	9 mos.	2 mos.	1 mo.
1952	7-1/2 mos.	1/2 mo.	4 mos.

In addition to the fact that appellants spent most of their time in California, they owned a substantial home in this state and their son lived here, The record contains no evidence that their accommodations in Chicago were of comparable substance.

Appellants rely on Mr. Berman's continued voting registration in Illinois as evidence of their Illinois residency during the years in question. Respondent's regulations provide that the state in which an individual is registered to vote is relevant in determining one's domicile, but is otherwise of little value in determining one's residence. (Cal. Admin. Code, tit. 18, reg. 17013-17015(f), now reg. 17014-17016(f).) Nor does Mr. Berman's maintenance of his Chicago law office appear significant, in view of the fact that he has continued to maintain it until as recently as June 1964, though he has concededly been a resident of California since 1953. His extensive absences from that office imply that he was not active in its operation and we have not been presented with convincing evidence to the contrary. Similarly, there is a lack of persuasive proof that he was an active member of clubs in Chicago.

Appellants contend that they came to 'California in an attempt to relieve Mr. Berman's hypertension. Respondent's regulations provide that if a person is in California only for a brief rest or vacation, he will not be considered a resident of this state by virtue of his presence here, This provision is limited as follows:

> If, however, an individual is in this State to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, ... he is in this State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income (Cal. Admin. Code, tit, 18, reg. 17013-17015.**' (b), now reg, 17014-17016(b).)

Thus, the reason advanced by appellants for coming to California does not compel a conclusion that they did not become residents.

It is true that appellants did not sever all connections with Illinois when they moved to California. They have not demonstrated, however, that those 'connections had 'substance . From all that appears in the record, the connections were no more than remnants of past attachments. In view of the facts that appellants purchased a house in California in 1948, and thereafter spent steadily decreasing amounts of time in Chicago each-year, an inference may readily be drawn that they had determined to live in California and that their trips to Chicago were made only to wind up their affairs, After considering all the evidence we are of the opinion that appellants were; within the meaning of the relevant statute and regulations, residents of California during the years 1949 through 1951.

RETURNS

On April 22, 1953, appellants filed delinquent joint nonresident returns for 1949 and 1950. On April 3, 1957, following respondent's investigation and its determination . that appellants had been residents of California continuously' since 1949, appellants filed amended separate resident returns for the above mentioned years. Respondent refused to accept the amended returns on the ground that appellants were precluded from changing from joint to separate returns after the time for filing the returns had expired.

Section 18402 of the Revenue and Taxation Code gives a husband and wife the right to file either a single joint return or separate returns for each taxable year. Prior to 1952, it was well settled law that the election to file a joint return was irrevocable after the time to file had expired.' (Rose v. Grant, 39 F.2d 340, cert. dismissed 283 U.S. 867 [75 L. Ed. 1471]; Appeal of Max and Lily Peterman, Cal. St. Bd. of Equal., June 12, 1957.) Since the addition in 1952 of sections, 18409 et seq., to the Revenue and Taxation Code, a husband and wife who have filed a joint return are permitted, under the circumstances there prescribed, to make separate returns after the time for filing returns has expired. Those sections were expressly limited in their application, however, to taxable years beginning after December 31, 1951. (Stats. 1952, pp. 132, 136.)

Appellants contend that the "binding election" rule which prevailed prior to 1952 is not applicable to them because their filing of nonresident returns on a joint basis did not constitute an election as to the basis for filing resident returns.' We cannot agree.

Section 18402, which permits the election to file a joint return, makes no distinction between resident *and* nonresident returns. If a joint return is filed for a given taxable year, accordingly, the taxpayers have made their

election to use a joint return for that year whether they compute their tax in the return as residents or as nonresidents.

Respondent therefore properly refused to accept appellants' amended separate, resident returns for the years 1949 and 1950.

LOSS ON SALE OF HOUSE

In 1948 appellants purchased a home in Beverly Hills for $43,540. They ceased to occupy that home in January 1951, and listed it with a Beverly Hills realtor for rent, as furnished, on June 1, 1951, at $400 per month. At that time the realtor estimated the fair market value of the house, including furniture, to be $45,000. The house was never rented prior to its sale for $34,000 in November 1951. The $11,000 'loss deduction claimed by appellants in their 1951 returns was disallowed by respondent.

A loss incurred in business or in a transaction entered into for profit was, during the year in question, deductible under section 17306 (now 17206) of the Revenue and Taxation Code. The regulation adopted pursuant to that section provided that if property purchased for use by the taxpayer as his personal residence was rented or otherwise appropriated to income-producing -purposes and was so used up. to the time of its sale, a loss on the sale was deductible. The deductible loss was not to exceed the difference between the sales price and the value of the property at the time it was appropriated to income-producing purposes. According to the regulation, the conversion to income-producing purposes could take place even though the property was not actually rented. (Cal, Admin Code tit. 18, reg. 17306(a). Cf. present regulation 17206(i) and Morgan v. Commissioner, 76 F.2d 390, cert. denied 296 U.S. 601 [80 L. Ed. 426].)

Respondent's position is that appellants have not established the value of the property at the time it was converted to income-producing purposes. The only evidence submitted by appellants on the question of value is a letter from the rental agent, a realtor, stating without elaboration that in his opinion the value on June 1, 1951, was $45,000. it would require very persuasive proof to establish that the house was worth that amount on June 1, 1951, in view of the fact that it sold only five months later for $34,000.

Mr. Berman testified that he sold at a low price because he was ill and his doctor advised him to quit worrying about the house. But it has not been established what effort was made to sell the house, why a reasonable effort to sell would have been a source of great concern or why even at a quick sale the best offer would be $11,000 under the market

value. The qualifications of the realtor as an expert appraiser have not been shown, nor does his letter contain any data supporting his estimate. Upon the evidence before us, we cannot find that the value of the house at any time after appellants ceased to occupy it, exceeded the price at which they sold it.

GAIN ON CORPORATE LIQUIDATION

Hotel Management Corporation, a foreign corporation in which appellants held stock, was liquidated on July 31, 1951. For federal income tax purposes, appellants made timely elections under section 112(b)(7) of the 1939 Internal Revenue Code to defer recognition of a portion of the gain realized on the liquidation.

Section 17688 (now 17402) of the Revenue and Taxation Code, which became effective on September 22, 1951, is substantially the same as section 112(b)(7) of the 1939 Internal Revenue Code (now Int. Rev. Code of 1954, § 333). In order to qualify for the special treatment provided therein, section 17688 requires the filing of written elections "within one month after the adoption of the plan of liquidation, or within one month after the effective date of this section, whichever is later, ..." Timely elections were not filed with respondent and, accordingly, it allocated the entire gain to the year 1951.

Appellants argue that they did not consider themselves to be residents of California in 1951 and had no reason to file elections in that year because, as nonresidents, they would not have been taxable by this state on the gain derived. But the statutory language requiring an election within the time specified is clear and unequivocal, permitting no room for interpretation or deviation. (N. H. Keliey, T.C. Memo., Dkt. Nos. 22356, 22357, 22360, 22361, Feb. 13, 1951. See also, J. E. Riley Investment Co. v. Commissioner, 311 U.S. 55 [85 L. Ed. 361]. To be distinguished are such cases as Baca v. Commissioner, 326 F.2d 189; Gentsch v. Goodyear Tire & Rubber Co., 151 F.2d 997; and Van Keppel v. United States, 206 F. Supp. 42, aff'd, 321 F.2d 717. Although the taxpayers in the latter cases were allowed to perform certain acts after the time limit urged by the Commissioner of Internal Revenue, none of those cases was concerned with an election clearly required by statute to be made within a specified time. It is noted that respondent's regulations with respect to section 17402, the successor of section 17688, specifically provide that "Under no circumstances shall Section 17402 be applicable to any shareholders who fail to file their elections within the 30-day period prescribed." (Cal. Admin. Code, tit. 18, reg. 17402(c).)

Since appellants failed to file their elections within the time prescribed by section 17688, we have no alternative but to find that they cannot be accorded the special treatment provided by that section.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Matthew Berman and the Estate of Sonia Berman against proposed assessments of additional personal income tax against Matthew Berman, individually, in the amount of $2,601.38 for the year 1951, against the Estate of Sonia Berman, individually, in the amount of $2,601.38 for the year 1951, and against Matthew Berman and the Estate of Sonia Berman, jointly, in the amounts of $316.49, $774.57, $225.75, $15.38 and $131.43 for the years 1949, 1950, 1954, 1956 and 1957, respectively, be modified in accordance with the concession of the Franchise Tax Board allowing use of the installment method of reporting gain for the year 1951. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Pasadena, California, this 28th day of June, 1965, by the State Board of Equalization.

John W. Lynch, Chairman

Paul R. Leake, Member

Geo. R. Reilly, Member

_____, Member

_____, Member

Attest: _____, Secretary